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JUL 18 2008

In re Application of
Christopher Dube et al.
Application No. 10/601,606
Filed: June 23, 2003
Attorney Docket No: DR-352J

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a)¹, filed June 30, 2008, to revive the above identified application.

The petition is **GRANTED**.

This application became abandoned December 18, 2007 for failure to file a timely response to the Notice of Non-Compliant Amendment (37 CFR 1.121) mailed November 16, 2007. Accordingly, a Notice of Abandonment was mailed June 16, 2008.

The instant petition is filed with an amendment in response to the Notice of Non-Compliant Amendment (37 CFR 1.121) mailed November 16, 2007 in addition to an argument that the delay in timely filing the response was unavoidable.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the

¹ A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

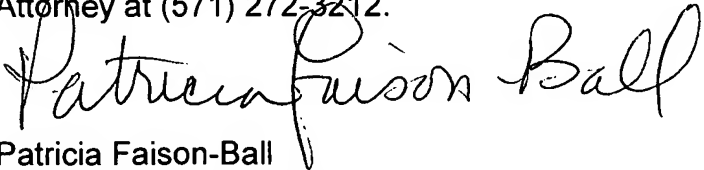
ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.²

Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.³

A review of the file record discloses that the Notice of Non-Compliant Amendment (37 CFR 1.121) was mailed to the address of record. However, petitioner contends that it was not received. In support of this contention, copies of pages from the docket wherein receipt of the November 16, 2007 Notice would have been entered, had it been received, accompany the petition. The submissions provided, corroborate non-receipt of the Notice of Non-Compliant Amendment (37 CFR 1.121) mailed November 16, 2007.

In view of the facts set forth in the petition, it is concluded that the Notice of Non-Compliant Amendment (37 CFR 1.121) mailed November 16, 2007 was never received. Accordingly, this matter is being referred to Technology Center 3753 for treatment of the amendment filed with the instant petition.

Telephone inquiries concerning this matter should be directed to the undersigned Petitions Attorney at (571) 272-3212.



Patricia Faison-Ball
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Office of Petitions

²In *re* Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

³*Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).